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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 609

Case No. 634: ABBASSENE Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Hubert Thierry; Mr. Mikuin Leliel Balanda;

Whereas, at the request of Abdelkader Abbassene, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 July and 30 November 1990 and 28 February 1991 the time-limit for the filing of an application to the Tribunal;

Whereas, on 12 January 1991, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, further extended to 31 March 1991 the time-limit for the filing of an application to the Tribunal;

Whereas, on 9 March 1991, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 29 March 1991, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

> "(a) to rescind the Respondent's decision of 14 June 1988 to terminate his employment with UNDP and to direct the Respondent to reinstate him as staff member;
>
> (b) to order payment to the Appellant of salary lost during the period of employment between the termination of his contract and the reconstruction of his career."

Whereas the Respondent filed his answer on 25 August 1992;

Whereas the Applicant filed an additional document on 2 May 1993;

Whereas, on 4 June 1993, the Tribunal put questions to the Respondent, to which he replied on 15 and 22 June 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 1 February 1971, as a Driver at level 2 of the local salary scale, in the UNDP Office in Algiers. He served on a succession of fixed-term appointments until 1 March 1980, when he was granted a probationary appointment and assigned to a post of Driver/Mechanic. On 1 May 1981, he was granted a permanent appointment. The Applicant was promoted to level 3 on 1 January 1981 and to level 4 on 1 January 1985.

In 1984 and 1985, the UNDP Governing Council asked host Governments to increase the level of their contributions towards the costs of operating local offices. The level of contributions towards the local office costs in Algeria was to increase from 50 per cent to 75 per cent, commencing in 1987.

In a letter dated 11 July 1987, the UNDP Resident Representative advised the Applicant that he had been very

disappointed at finding the Applicant and other drivers engaged in a domino game during working hours. This fact had confirmed to him that the functions of Driver/Mechanic did not sufficiently occupy the Applicant's time; accordingly, in addition to his duties as Driver/Mechanic, the Applicant would be assigned to building maintenance tasks which would be reflected in an amended job description.

On 1 August 1987, the UNDP Deputy Resident Representative in Algiers gave the Applicant his new job description. In addition to his duties as a Driver/Mechanic, the Applicant was to perform the duties of a maintenance clerk, which included the maintenance of the common areas of the United Nations building and the floors occupied by UNDP and other agencies, as well as repairs of those premises.

On 4 August 1987, the Applicant wrote to the Deputy Resident Representative, stating that the tasks described in his new job description could not be discharged by a single person. He asked that the decision to assign him additional duties be reconsidered.

In a reply dated 9 August 1987, the Deputy Resident Representative recalled that the Resident Representative had personally explained to the Applicant that all staff in the office were required to make a greater effort to discharge all duties for which they were responsible. In addition, it had been made clear to the Applicant that he must undertake maintenance duties, in addition to his duties of a Driver/Mechanic, as those duties did not occupy his time completely.

In a memorandum dated 5 January 1988, the Resident Representative proposed to the Deputy Director, Division of Personnel, certain reductions of core posts in the Algiers Office.

With regard to the Applicant's post he stated:

"(i) Post No. 103539 Driver/Mechanic [the Applicant's post]

I have already consulted my colleagues through the attached letter on the possibility of cost-sharing the extrabudgetary post that should be created to maintain basic mechanical repair facilities at least until such time as local commercial services meet required standards in terms of quality and cost.

...

I trust that the above proposals accurately reflect the consensus reached with DOP/RBASEP [Regional Bureau for Arab States and European Programmes] on 21 December and that they will meet with your approval."

On 14 April 1988, the Director, Division of Personnel, sought the Administrator's approval to terminate the permanent appointments of two local staff members in Algiers for abolition of post. The Applicant was one of them. The Director of Personnel explained that this decision had been taken due to financial constraints on the part of the Algerian Government, which contributed a substantial portion of local staff salaries, and that the Applicant and another staff member could not be placed in other posts. On 2 May 1988, the Administrator approved the request for termination of the Applicant's appointment for abolition of post.

In a memorandum dated 14 June 1988, the Deputy Assistant Administrator informed the Applicant that since the post which he encumbered had been abolished, the Administrator had decided to terminate his appointment under staff regulation 9.1 (a), effective 15 June 1988.

In a cable dated 15 June 1988, the Applicant requested a review of that decision. Not having received a substantive reply from the Administration, the Applicant lodged an undated appeal with the Joint Appeals Board, which was received by the Board on 29 November 1988. The Board adopted its report on 29 August 1989. The majority of the Panel that considered the case recommended as follows:

"34. ...

the decision of the Deputy Resident Representative to require the appellant to perform maintenance functions for an entire building, in addition to performing his regular duties as Driver/Mechanic, amounted to unfair treatment;

the decision to terminate the appellant's permanent contract for abolition of post under staff regulation 9.1 (a) appears to have been motivated by antagonism resulting from the appellant's objection to his new job description and was not due solely to 'reduced financial allocations available for the operations of the UNDP Office in Algeria';

the termination of the appellant's contract of employment was improper because efforts made by the Resident Representative, in this connection, were inadequate to satisfy the conditions for terminating permanent appointment for abolition of the post or reduction of the staff as set forth in staff rule 109.1 (c).

35. Accordingly, the majority of the Panel recommends that the Administration reinstate the appellant in the full enjoyment of his appointed status as a permanent contract holder.

36. It further recommends that the appellant be restored to all rights and benefits appertaining thereto, as fully and completely as though no termination of his appointment had been made."

In a dissenting opinion, the Chairman of the Panel stated:

2. ... The record shows that the abolition of the post held by the appellant was a managerial decision following the UNDP Governing Council resolutions concerning the level of government contribution to local cost. There is no evidence from the record that there was a motivation other than a managerial one connected with the abolition of the post. ...

3. Concerning the termination of the appellant, the record shows that this was due to the abolition of his post. ...

4. ... At about the time that the abolition of posts took effect, the Staff Management Co-ordinating Committee (SMCC) recommended to the Secretary-General criteria for the granting of termination benefits in different situations. Though this development may have occurred too late for the UNDP Administration to take into account in the case of the appellant, it nevertheless emphasizes that the termination benefit in his case could have justifiably included the

additional 50 per cent benefit. For the above reasons, I believe that the Administration could have been more generous and given an additional 50 per cent termination benefit.

Recommendation

4. In conclusion, I recommend that the appeal of the appellant to be reinstated be rejected. However, I also recommend that the appellant be granted an additional 50 per cent separation benefit."

On 12 January 1990, the Officer-in-Charge, Department of Administration and Management, informed the Applicant that the Secretary-General had re-examined his case in the light of the Board's report and had decided to maintain the contested decision of the UNDP Administrator to terminate his appointment for abolition of post under staff regulation 9.1 (a) and staff rule 109.1 (c). He added, in part:

"... It is the view of the Secretary-General that good faith efforts were made by UNDP to find an adequate post for you as shown on the official record. Furthermore, there is no concrete evidence of alleged improper motives on the part of the Administration.

The Secretary-General has therefore decided, taking into account the entire circumstances of your case, to grant you, on an exceptional basis, an additional 50 per cent termination indemnity under staff regulation 9.3 (b) in final settlement of your case."

On 29 March 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's appointment was not based on the requirements of the service but on antagonism towards him and thus constituted unfair treatment.

2. The Respondent did not follow the requirements of staff rule 109.1 (c) in cases of termination of appointment for abolition of post.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's appointment was caused by the abolition of the post he occupied because of the necessities of the service, as provided for in staff regulation 9.1 (a), which provision is part of the Applicant's terms of employment.

2. Staff rule 109.1 (c) contains procedural safeguards designed to protect staff faced with separation on account of abolition of post. These safeguards were applied.

The Tribunal, having deliberated from 2 June to 1 July 1993, now pronounces the following judgement:

I. The Tribunal, in reviewing the application which has been submitted to it, must take a decision on two separate questions. In the first place, it must determine the accuracy of the reason cited by the UNDP authorities for the decision whereby the Applicant, who had been employed since 1971 as a Driver/Mechanic in the UNDP Office in Algiers, was terminated, effective 15 June 1988. Secondly, the Tribunal must determine whether the safeguards of staff regulation 9.1, should be applicable to permanent staff members who are faced with separation on account of abolition of post, have been observed.

II. The Respondent maintains that the only reason for the measure taken in the Applicant's case was the abolition of his post owing to a staff reduction made necessary by the decrease in the Algerian Government's contribution to the salaries of locally recruited UNDP staff.

The Applicant contends that, on the contrary, his termination resulted from his refusal to accept the change in his original job description. The UNDP Deputy Resident Representative in Algiers, believing that the Applicant's dutioes as a Driver/Mechanic did not fully occupy his working hours had

ordered him to add to them the maintenance of the UNDP premises. This is the measure that the Applicant rejected, arguing that these additional tasks did not reflect his functions and abilities and made his workload too heavy.

Prior to this, an incident had occurred, an account of which can be found in a document which the Respondent has annexed to his answer: on the occasion of an unannounced visit to the garage where the Applicant performed his duties, the UNDP Resident Representative found him playing dominoes with two other drivers and two persons who were not members of the staff. The Applicant does not dispute the truthfulness of this account of the episode, which induced the Administration to assign him additional duties; however, he asserts that it constituted the real reason for his termination. If this were the case, the reason officially cited for the termination would be inaccurate.

III. The Tribunal believes that the only way of resolving this dispute would be to conduct a thorough investigation, which could hardly be carried out with any likelihood of success, in view of the time which has elapsed since the incident occurred. While considering that it is not improbable that the domino-playing incident had a negative impact on the Applicant's fate, the Tribunal finds that the burden of proving the inaccuracy of the reason cited by the Administration has not been discharged. The Tribunal considers that the documents which were transmitted to it by the Respondent show that the Algerian Government had indeed reduced its contributions.

IV. With regard to the measures that should be adopted for the purposes of implementing staff regulation 9.1 and, accordingly, the efforts that should be made to reassign the Applicant, if possible, to a post commensurate with his abilities, the Tribunal notes that the UNDP Resident Representative in Algiers planned to create, on a provisional basis, an extrabudgetary mechanic post which could have been suitable for the Applicant. This plan did not work out, but it

testifies to the Administration's good will, since the record shows that the UNDP authorities in Algiers were hardly in a position to offer the Applicant a replacement post.

V. The Tribunal finds, however, that the Applicant's termination was carried out in a remarkably hasty manner. Having worked for UNDP since 1971 - hence, for 17 years - he was informed on 14 June 1988 of his termination, effective the following day, 15 June 1988. This procedure did not give him any time to look fo another job in Algiers, where there was a severe and prolonged crisis in the labour market. Accordingly, the Applicant should be compensated.

The Tribunal believes that an indemnity of $1,000, over and above the statutory termination indemnity which he has already received, should be awarded to the Applicant as compensation for the injury caused to him by the manner in which his termination was carried out.

VI. For the foregoing reasons:

1. The Tribunal orders that the Applicant be awarded an indemnity of $1,000.

2. All other requests are rejected, including the request for the production of records.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Hubert THIERRY
Member

Mikuin Leliel BALANDA
Member

Geneva, 1 July 1993

R. Maria VICIEN-MILBURN
Executive Secretary